(3)

No. 06-760

FILED
DEC 26 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

KATHY COOPER, BETH HARRINGTON AND MATTHEW HILLSHEIM,

Petitioners,

v.

THE IBM PERSONAL PENSION PLAN AND IBM CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONERS

MARY ELLEN SIGNORILLE*
AARP FOUNDATION LITIGATION

MELVIN RADOWITZ
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae* AARP
*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

REASONS FOR GRANTING THE PETITION 3

ARGUMENT 5

I. OLDER WORKERS HAVE EXPERIENCED GREATER LOSSES OF EXPECTED BENEFITS IN CASH BALANCE CONVERSIONS THAN YOUNGER WORKERS. 5

II. CASH BALANCE PLANS MUST COMPLY WITH THE RULES FOR DEFINED BENEFIT PLANS 9

A. The Nearly Decade-Long Advocacy Effort Was Successful in Ensuring Older Workers' Benefit Accruals Were Neither Eliminated Nor Reduced Because of Age. 9

B. After More than Seven Years of Debate, Congress Recently Revised the Tests Only on a Prospective Basis to Determine Whether Benefit Accruals Decline on Account of Age 11

C. "The Rate of an Employee's Benefit Accrual" is Based On the Annual Change in the Value of an Annuity at Normal Retirement Age Expressed in Annuity Form. 13

D. Employee Benefit Plan Provisions May Result in Age Discrimination. 17

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES

AARP v. EEOC, 655 F. Supp. 228 (D.D.C.), *rev'd in part*, 823 F.2d 600 (D.C. Cir. 1987) 1, 9

AARP v. Farmers Group, Inc., 700 F. Supp. 1052 (C.D. Cal. 1988), *aff'd*, 943 F.2d 996 (9th Cir. 1991) 1

Arizona Comm. for Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983) 18, 19

Arnett v. CalPERS, 179 F.3d 690 (9th Cir. 1999), *vacated and remanded on other grounds*, 528 U.S. 1111 (2000) 18, 19

Auerbach v. Board of Educ. of Harborfields Cent. Sch. Dist., 136 F.3d 104 (2d Cir. 1998) 10

Bell v. Trustees of Purdue Univ., 975 F.2d 422 (7th Cir. 1992) 10

Berger v. Xerox, 338 F.3d 755 (7th Cir. 2003) ... 10, 14, 15

Campbell v. BankBoston, 327 F.3d 1 (1st Cir. 2003) 6

Central Laborers' Pension Fund v. Heinz, 541 U.S. 739 (2004) 2

City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) 17, 18

Cooper v. IBM, 274 F.Supp. 2d 1010 (S.D. Ill. 2003) 8

Cooper v. IBM, 457 F.3d 637 (7th Cir. 2006) ..... *passim*

Eaton v. Onan, 117 F. Supp.2d 812 (S.D. Ind. 2000) ... 5, 6

Engers v. AT&T Corp., 2000 U.S. Dist. LEXIS 10937
(D.N.J. 2000) (unpublished) 3

Esden v. Bank of Boston,
229 F.3d 154 (2d Cir. 2000) ..... *passim*

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 2

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 2

Hirt v. Equitable Retirement Plan,
441 F.Supp. 2d 516 (S.D.N.Y. 2006) 3

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 14

Hurlic v. Southern California Gas Co.,
No. 2:05-cv-05027-R-MAN
(C.D. Cal. March 23, 2006), *appeal docketed*,
Case No. 06-55599 (9th Cir. April 21, 2006) 3

In re Citigroup Pension Plan ERISA Litig.,
2006 WL 3613691 (S.D.N.Y. Dec. 12, 2006) 4

In re J.P. Morgan Chase Cash Balance Litig.,
2006 WL 3063424 (S.D.N.Y. Oct. 30, 2006) 4

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 19

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 2

Lyons v. Georgia-Pacific Corp.,
221 F.3d 1235 (11th Cir. 2000) ..... *passim*

Maki v. Allete, Inc., 383 F.3d 740 (8th Cir. 2004) 18

Miller v. Xerox Corp. Retirement Income Guarantee Plan, 447 F.3d 728
(9th Cir. 2006) 3, 14, 15

Public Employees Retirement Sys. v. Betts,
492 U.S. 158 (1989) 2

Register v. PNC, 2005 WL 3120268 (E.D.Pa. 2005),
appeal docketed, Case No. 05-5445
(3rd Cir. December 16, 2005) 3

Richards v. FleetBoston Fin. Corp.,
2006 WL 3000768 (D. Conn. Oct. 16, 2006) 4

Richards v. Fleetboston Financial Corp.,
427 F. Supp. 2d 150 (D. Conn. 2006) 16

Snair v. City of Clearwater, 817 F. Supp. 108
(M.D. Fla. 1993) 1

Solon v. Gary Cmty. Sch. Corp.,
180 F.3d 844 (7th Cir. 1999) 9, 18

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 16

Von Aulock v. Smith,
720 F.2d 176 (D.C. Cir. 1983) 9

FEDERAL STATUTES, REGULATIONS AND LEGISLATIVE HISTORY

Age Discrimination in Employment Act (ADEA),
§4(f)(2), 29 U.S.C. §623(f)(2) 10
§4(f)(2)(B)(i), 29 U.S.C. §623(f)(2)(B)(i) 10
§4(i)(1), 29 U.S.C. §623(i)(1) 16

Employment Retirement Income Security Act (ERISA) of 1974,
§3(23)(B), 29 U.S.C. §1002(23)(B) 14
§204(b)(1), 29 U.S.C. §1054(b)(1) 11
§204(b)(1)(A), 29 U.S.C. §1054(b)(1)(A) 14
§204(b)(1)(H), 29 U.S.C. §1054(b)(1)(H) . 10, 15, 16
§204(b)(2), 29 U.S.C. §1054(b)(2) 16

Internal Revenue Code (IRC),
IRC §415(a) 15, 16
IRC §411(b)(1)(H) 16
IRC §411(b)(2) 16

29 C.F.R. §1625.7(c) 18
29 C.F.R. §1625.10 ..... 10, 17

67 Fed. Reg. 76123 (December 11, 2002) 6, 16

Announcement 2004-57, 2004-27 I.R.B.
(July 6, 2004) 3, 12

Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, H.R. 2673, 108th Cong. (2004) 2, 12

Older Workers Benefit Protection Act,
PUB. L. NO. 101-433, 104 STAT. 978 (1990) ... 1, 17

Omnibus Budget Reconciliation Act of 1986,
PUB. L. NO. 99-509, 100 STAT. 1874 (1986) 1

Omnibus Budget Reconciliation Act of 1990,
PUB. L. NO. 101-508, 104 STAT. 1388 (1990) 17

Pension Protection Act,
PUB. L. NO. 109-280, 120 STAT. 780 (2006) . *passim*

Pension Protection Act,
H.R. 2830, 109th Congress (2006) 12

Pension Security and Transparency Act, S. 1783,
109th Congress (2006) 13

Retirement Equity Act,
PUB. L. NO. 98-397, 98 STAT.1426 (1984) 17

H.R. CONF. REP. 93-1280, reprinted in
1974 U.S.C.C.A.N. 5038 11

H.R. CONF. REP. 99-1012, reprinted in
1986 U.S.C.C.A.N. 3868 9

House Education and the Workforce Committee Press
Release, 4/6/2006, available at
http://www.house.gov/apps/list/press/
ed31_democrats/rel4606c.html. 13

MISCELLANEOUS

AARP Magazine, July-Aug 2003, available at, http://www.aarpmagazine.org/lifestyle/Articles/a2003-05-21-mag-justice_age.html. . . . 19

Dan M. McGill, et. al., FUNDAMENTALS OF PRIVATE PENSIONS (7th ed. 1996) 9

E. Schultz, *Actuaries Become Red-Faced Over Recorded Pension Talk*, available at http://www.careerjournaleurope.com/columnists/edchoice/19990505-schultz.html . . 2, 7, 8

Edward Zelinsky, *Cash Balance Controversy*, 19 VA. TAX. REV. 683 (2000) 7

EEOC Compliance Manual, Section 3, Employee Benefits (issued October 27, 2000) 19

GAO, PRIVATE PENSIONS: INFORMATION ON CASH BALANCE PENSION PLANS (GAO/HEHS-06-42, October 2005) 2, 5

Jeanne Sahadi, COURT: IBM CASH-BALANCE PENSION IS OKAY (Aug. 7, 2006), available at http://money.cnn.com/2006/08/07/pf/retirement/ibm_pension_ruling/index.htm 4, 8

PriceWaterhouse Coopers, *Survey of Cash Balance Conversions*, BENEFITS QUARTERLY, 1st Quarter 2001 5

STATEMENT OF INTEREST[1/]

AARP is a nonpartisan, nonprofit membership organization of more than 37 million persons age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older Americans. Approximately half of AARP's members are working. AARP fosters the economic security of individuals as they age by seeking to increase the availability, security, equity, pension and other employee benefits. AARP and its members have a substantial interest in ensuring that participants have access to pension plans that provide adequate retirement income and that the benefits accrued under a plan are not reduced because of a participant's age. Indeed, AARP has been advocating on the issue of age-based reductions in benefit accruals for over twenty years.

As part of its advocacy efforts, AARP was actively involved in supporting the passage of the Omnibus Budget Reconciliation Act of 1986, PUB. L. NO. 99-509, 100 STAT. 1874 (1986), and the Older Workers Benefit Protection Act, PUB. L. NO. 101-433, 104 STAT. 978 (1990). AARP challenged age-based denial of pension contributions and accruals in court. *See, e.g., AARP v. Farmers Group, Inc.*, 700 F. Supp. 1052 (C.D. Cal. 1988), *aff'd,* 943 F.2d 996 (9th Cir. 1991); *AARP v. EEOC*, 655 F. Supp. 228 (D.D.C.), *rev'd in part*, 823 F.2d 600 (D.C. Cir. 1987); *Snair v. City of Clearwater*, 817 F. Supp. 108 (M.D. Fla. 1993). AARP also has participated as *amicus curiae* in Supreme Court cases

---

[1] No counsel for any party authored any portion of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. The written consents of the parties have been filed with the Clerk of the Court pursuant to SUP. CT. R. 37.2(a).

deciding pension and employee benefits issues under the Age Discrimination in Employment Act (ADEA) and the Employee Retirement Income Security Act (ERISA). *See, e.g., Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

Since the late 1990's, AARP began receiving complaints from its members about the loss of their benefits during conversions of traditional defined benefit pension plans to cash balance plans. This came as no surprise inasmuch as commentators generally agree that mid-life and older workers -- AARP's members -- fare the worst in cash balance conversions. *E.g.*, GAO, PRIVATE PENSIONS: INFORMATION ON CASH BALANCE PENSION PLANS 6, 36-38 (GAO/HEHS-06-42, October 2005); E. Schultz, *Actuaries Become Red-Faced Over Recorded Pension Talk*, available at http://www.careerjournaleurope.com/columnists/edchoice/19990505-schultz.html.

Due to the tremendous negative impact cash balance conversions have had on AARP's members' retirement security, AARP vigorously advocated in Congress on numerous bills concerning cash balance plans including the recently enacted Pension Protection Act (PPA), PUB. L. NO. 109-280, 120 STAT. 780 (2006), and the provision in the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, H.R. 2673, 108th Cong. (2004) (H.R. 2673) which blocked implementation of Treasury's proposed regulations and required Treasury to propose legislation providing for transition relief for older and longer-service participants affected by cash balance conversions. *See* Announcement

2004-57, 2004-27 I.R.B. (July 6, 2004). AARP also submitted extensive comments presenting our views on, among other issues, the application of age discrimination statutory provisions to cash balance plans to the Treasury and the Internal Revenue Service on proposed regulations. Even more directly relevant to the question presented here, AARP has participated as *amicus curiae* in cases specifically concerning case balance plans. *Cooper v. IBM*, 457 F.3d 637 (7th Cir. 2006); *Lyons v. Georgia-Pacific Corp.*, 221 F.3d 1235 (11th Cir. 2000); *Hurlic v. Southern California Gas Co.*, No. 2:05-cv-05027-R-MAN (C.D. Cal. March 23, 2006), *appeal docketed*, Case No. 06-55599 (9th Cir. April 21, 2006); *Register v. PNC*, 2005 WL 3120268 (E.D.Pa. 2005), *appeal docketed*, Case No. 05-5445 (3rd Cir. December 16, 2005); *Hirt v. Equitable Retirement Plan*, 441 F.Supp. 2d 516 (S.D.N.Y. 2006); *Engers v. AT&T Corp.*, 2000 U.S. Dist. LEXIS 10937 (D.N.J. 2000) (unpublished).

In light of the significance of the issues presented by this case and the impact on AARP members and other older workers, AARP respectfully submits this brief to facilitate a full consideration by the Court of the questions presented.

REASONS FOR GRANTING THE PETITION

A writ of *certiorari* is appropriate because there is a substantial conflict between the Seventh Circuit's decision in this case and decisions in the Second, Ninth and Eleventh Circuits on the questions presented by the petitioners. *Compare Cooper v. IBM*, 457 F.3d at 639 (7th Cir. 2006) *with Miller v. Xerox Corp. Retirement Income Guarantee Plan*, 447 F.3d 728 (9th Cir. 2006); *Esden v. Bank of Boston*,

229 F.3d 154 (2d Cir. 2000);[2] *Lyons v. Georgia-Pacific Corp.*, 221 F.3d 1235 (11th Cir. 2000). More specifically, this conflict undermines ERISA's objective of national uniform administration of employee benefit plans because many companies with cash balance plans have offices in numerous states in different circuits; indeed, IBM has offices in every state. Moreover, a writ of *certiorari* is appropriate because the Seventh Circuit's decision completely ignores ERISA's statutory scheme which Congress again affirmed most recently with the enactment of the Pension Protection Act (PPA), PUB. L. NO. 109-280, 120 STAT. 780 (2006). Even though there are more than 1,500 cash balance plans covering over 8.5 million workers whose retirement security is being dramatically affected, Jeanne Sahadi, COURT: IBM CASH-BALANCE PENSION IS OKAY (Aug. 7, 2006), available at http://money.cnn.com/2006/08/07/pf/retirement/ibm_pension_ruling/index.htm, in the PPA, Congress decided to address only prospectively the issue of benefit accruals under cash balance plans. Thus, the issue presented by petitioners affects both a substantial number of plans and their covered participants.

---

[2] With the issuance of three recent district court decisions, *In re Citigroup Pension Plan ERISA Litig.*, 2006 WL 3613691 (S.D.N.Y. Dec. 12, 2006); *In re J.P. Morgan Chase Cash Balance Litig.*, 2006 WL 3063424 (S.D.N.Y. Oct. 30, 2006); *Richards v. FleetBoston Fin. Corp.*, 2006 WL 3000768 (D. Conn. Oct. 16, 2006), the conflict between the Seventh and Second Circuits has become even more apparent.

ARGUMENT

I. OLDER WORKERS HAVE EXPERIENCED GREATER LOSSES OF EXPECTED BENEFITS IN CASH BALANCE CONVERSIONS THAN YOUNGER WORKERS.

While the first cash balance plan was designed for Bank of America in 1985, cash balance plans were largely unheard of outside of the benefits consulting profession until the second half of the 1990's. Cash balance conversions have since become known as a means by which companies reduce the future pension benefits of their employees, especially older ones. A survey by PriceWaterhouse Coopers found benefit reductions of 20% or more for some employees in 59% of cash balance conversions. PriceWaterhouse Coopers, *Survey of Cash Balance Conversions*, BENEFITS QUARTERLY, 1st Quarter 2001, at 22.

Cash balance conversions have had their most adverse impact on older workers. In late 2005, the U.S. Government Accountability Office released a report on cash balance conversions, finding that older employees experience both greater reductions in future rates of benefit accruals than younger employees, and much lower benefits even though the benefits of younger employees remain roughly comparable to their previous benefits. GAO, PRIVATE PENSIONS: INFORMATION ON CASH BALANCE PENSION PLANS (GAO/HEHS-06-42, October 2005). The plain fact is that the benefits of older employees were reduced more than the benefits of younger employees. *Id.* at 6 and 36-38. Court rulings have also recognized this undeniable fact. *Eaton v. Onan*, 117 F. Supp.2d 812, 818, 831 n.9 and 832 (S.D. Ind. 2000) (older workers have "been getting the worst of both worlds as a result of these [cash balance] conversions"

because they "were too young to derive much benefit from the traditional "final average pay" design, but [were] too old to have gotten an early start in their careers on the benefits of a cash balance plan."); *Campbell v. BankBoston*, 327 F.3d 1, 5 and 8 (1st Cir. 2003) ("pension benefits stop[ped] accruing" in his "final years of service").

The cost savings that companies reap from cash balance conversions are achieved principally by the reduction in the benefits of older workers who are at a point in their careers where they cannot make up this loss of benefits. The cost savings are structured in three ways. First, a conversion changes the benefit formula from one based on final average pay to a formula based on each year's pay (which means that benefits from prior years are no longer adjusted as salaries increase). *Eaton v. Onan*, 117 F. Supp.2d at 818, 831 n.9 and 832; *Campbell v. BankBoston*, 327 F.3d at 5 and 8. Second, to the extent the plan may have provided "subsidized" early retirement benefits, the conversion ends these valuable benefits just before these workers would become eligible for them. Third, and most significantly, most conversions, like IBMs, are characterized by declining rates of benefit accrual for older employees. The Treasury Department finds that cash balance formulas generally produce a "larger accrual for younger employees when measured as the increase in the benefit payable at normal retirement age." 67 Fed. Reg. 76123, 76126 (December 11, 2002). Professor Edward Zelinsky explains:

> Consider, for example, a participant who, at ages thirty-five, forty-five, and fifty-five receives in each year a theoretical contribution of $1000 to her hypothetical cash balance account. As of age sixty-five, the earliest contribution will, in annuity terms, represent

> an annual income of $1094 per year; the $1000 contributed ten years later at age forty-five will constitute at retirement an annuity of $507 per year; and the last $1000 contributed at age fifty-five will, at retirement, represent an annuity of $225 per year. Thus, even though the employee, in defined contribution terms, has been accruing contributions at a steady pace (i.e., $1000 per year), the employee has been earning benefits at a decreasing rate in defined benefit terms.

The Cash Balance Controversy, 19 VA. TAX. REV. 683, 722-23 (2000).

Indeed, actuaries who proposed cash balance plans were well aware of the amount of benefit reductions and who were most affected. E. Schultz, *Actuaries Become Red-Faced Over Recorded Pension Talk, supra* at 2. This Wall Street Journal article quotes an October 1998 Society of Actuaries' meeting where consulting actuaries joked about the benefit reductions:

> Amy Viener, an actuary at William M. Mercer Inc., noted: "You switch to a cash-balance plan where the people are probably getting smaller benefits, at least the older-longer-service people; but they are really happy, and they think you are great for doing it."
>
> An actuary with Watson Wyatt Worldwide who spoke on a panel called "Introduction to Cash Balance/Pension Equity Plans" alongside Ms. Viener, is heard saying on a tape: "It is

> not until they are ready to retire that they understand how little they are actually getting." "Right, but they're happy while they're employed," responded Ms. Viener of Mercer.

Id.

Cash balance plans are designed to reduce the amount older workers earn under cash balance formulas. Not only are older workers earning much less than under the prior defined benefit formulas, but most significantly, they are earning much less than younger workers who are similarly situated in every respect except age. Given the demographics of the United States, this means that these older workers will have less to make ends meet to maintain a secure retirement in their old age, which is the very problem that the 1986 reform was designed to address. *See* Argument II.A, *infra*.

IBM and other corporations that converted to cash balance pension plans "proceeded with eyes wide open and [were] fully informed of the consequences of litigation that was sure to come." *Cooper v. IBM*, 274 F.Supp. 2d 1010, 1022 (S.D. Ill. 2003). With over 8.5 million workers participating in cash balance plans, Jeanne Sahadi, COURT: IBM CASH-BALANCE PENSION IS OKAY (Aug. 7, 2006), *supra* at 4, the issue of the legality of cash balance plan benefit accruals is still significant for all workers, since everyone ages.

II. CASH BALANCE PLANS MUST COMPLY WITH THE RULES FOR DEFINED BENEFIT PLANS.

A. The Nearly Decade-Long Advocacy Effort Was Successful in Ensuring Older Workers' Benefit Accruals Were Neither Eliminated Nor Reduced Because of Age.

Starting in the late 1970's, AARP and others engaged in a nearly decade-long advocacy effort to obtain new rules on benefit accruals for older workers. *See, e.g., Von Aulock v. Smith*, 720 F.2d 176, 182-84 (D.C. Cir. 1983); *AARP v. EEOC*, 823 F.2d. 600, 601-602 (D.C. Cir. 1987). Congress, business, and employee organizations were all aware that defined benefits cost more for older workers than for younger workers if the funding of defined benefit obligations is viewed on a per capita basis. *See, e.g.*, H.R. CONF. REP. 99-1012, 379; 1986 U.S.C.C.A.N. 3868, 4024 ("repeal" of the present law exclusion of older workers from defined benefit participation "may have the effect of increasing an employer's minimum funding requirements significantly for employees hired within five years of normal retirement age").

Indeed, a respected authority in this field shows how, on a per capita basis, the "normal cost" of delivering a $100 per year benefit at age 65 to employees who are currently age 30 can be less than 1/30th of the normal cost of delivering an additional $100 per year benefit to employees when they approach age 65. Dan McGill, FUNDAMENTALS OF PRIVATE PENSIONS at 528 (7th ed. 1996). Defined benefit plans are, however, funded on a group basis. *See Solon v. Gary Cmty. Sch. Corp.*, 180 F.3d 844, 854 n.4 (7th Cir. 1999) ("Broadly speaking, a defined benefit plan is one consisting of a general pool of assets (rather than individualized accounts) from

which an employee, upon retirement, is periodically paid a fixed amount"). There are no actual accounts and no separate individual contributions in defined benefit plans for older versus younger workers. *See Berger v. Xerox*, 338 F.3d 755, 758 (7th Cir. 2003).

When Congress enacted ERISA §204(b)(1)(H) in 1986, with parallel provisions in the ADEA and the Internal Revenue Code, Congress regulated the benefits that defined benefit plans offer and did not make the "bona fide plan" exception a part of its age discrimination standard. *See, e.g.*, ADEA §4(f)(2), 29 U.S.C. §623(f)(2) (bona fide plan exception applies to actions otherwise prohibited under sections (a), (b), (c) or (e), not actions prohibited under section (i)); *Bell v. Trustees of Purdue Univ.*, 975 F.2d 422, 423-24 (7th Cir. 1992) (before 1986 amendments, discontinuing pension benefits after certain ages was not prohibited if the provision was part of a bona fide plan). However, the ADEA safe harbor only applies where the actual amount of payment or the actual cost incurred on behalf of an older worker is not less than that incurred on behalf of a younger person (equal cost or equal benefit rule). *See, e.g.*, 29 U.S.C. §623(f)(2)(B)(i); 29 C.F.R. §1625.10; *Auerbach v. Board of Educ. of Harborfields Cent. Sch. Dist.*, 136 F.3d 104, 112 (2d Cir. 1998).[3] Finally, Congress did not qualify its regulation of benefits in any other way based on the hypothetical "costs" of benefits from a per capita or other non-group perspective.

---

[3] *Cooper's* application of an imputed cost analysis conflicts with Congress' express rejection of such a defense for age discrimination in defined benefit plans. *Cooper*, 457 F.3d at 640.

The legislation that came out of the Conference Committee in October 1986 was unquestionably broader in two critical respects than the Senate bill. The Conference understood that if Congress restricted the protection against ceasing of accruals to "after normal retirement age," a plan could decrease an employee's rate of accruals before that age, which is usually age 65. The new law would not be violated because the cessation in accruals occurred prior to age 65. The Conference Committee also understood that the law needed to protect against "reductions" in the rate of accruals before 65. Because at least one of ERISA's "anti-backloading" rules permits "unlimited frontloading" of benefit accruals, no other provision of ERISA would necessarily be violated by such reductions. *See* H.R. CONF. REP. 93-1280, at 274, reprinted in 1974 U.S.C.C.A.N. 5038, 5055-56.

Accordingly, the Conference bill provided that "a defined benefit plan shall be treated as not satisfying the requirements of this paragraph [§204(b)(1)] if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age." It is this language which is at issue in this case.

B. After More than Seven Years of Debate, Congress Recently Revised the Tests Only on a Prospective Basis to Determine Whether Benefit Accruals Decline on Account of Age.

Until the enactment of the Pension Protection Act, Congress never specifically authorized the concept of a "hybrid" plan like a cash-balance plan; instead the "rigidly binary" statutory scheme Congress established regulated

these plans. *Esden v. Bank of Boston*, 229 F.3d 154. Indeed, *Cooper* improperly relied on interpretive regulations the Treasury Department had issued even though Congress made it clear that it disagreed with Treasury's interpretation. *E.g.*, H.R. 2673.

On September 15, 1999, the Internal Revenue Service placed a moratorium on the issuance of tax qualification determination letters involving defined benefit plans that were converted to cash balance plans because Congress had such issues under consideration. Announcement 2004-57, 2004-57 I.R.B. The moratorium is still in effect.

At various times since 1999 Congress refused to legitimize cash balance plans. In 2004, Congress prohibited the implementation of Treasury's proposed regulations which would have retroactively legitimize cash balance plans. H.R. 2673. Instead, Congress required Treasury to propose legislation providing for transition relief for older and longer-service participants affected by cash balance conversions. *Id.* Treasury withdrew its proposed regulations and proposed legislation that would require a five-year "hold harmless" period for current employees following a cash balance conversion, would ban "wearaway" and clarify the legal status of cash balance plans. Announcement 2004-57, 2004-57 I.R.B.

Congress addressed many issues in its recently enacted Pension Protection Act (PPA), PUB. L. NO. 109-280, 120 STAT. 780 (2006). The provisions of the PPA addressing cash balance plans were heavily debated, with business pushing for legitimizing cash balance plans both prospectively and retroactively. Indeed, the bill voted out of the House provided retroactive relief. Pension Protection Act, H.R. 2830, 109th Cong. (2006). The Senate rejected

such broad relief, and instead provided relief for cash balance plans solely on a prospective basis. Pension Security and Transparency Act, S. 1783, 109th Cong. (2006). Congress adopted the Senate bill. House Education and the Workforce Committee Press Release, 4/6/2006, available at http://www.house.gov/apps/list/press/ed31_democrats/rel4606c.html. The PPA provides relief for cash balance plans that are converted from a traditional defined benefit plan exclusively on a prospective basis and, then if, and only if, certain protections are put in place for participants. Section 701(b) of the PPA, PUB. L. NO. 109-280, 120 STAT. 780 (2006). If the cash balance plan does not meet the PPA's requirements, it will fail the age discrimination rules for benefit accruals. *Id.* Congress took no position regarding the legality of cash balance pension plans retroactively. Congress specifically stated that the amendments in the PPA should not give rise to any inference about whether cash balance plans were age discriminatory prior to the PPA's enactment. Section 701(d) of the PPA, PUB. L. NO. 109-280, 120 STAT. 780 (2006). Consequently, the issue of whether benefit accruals are reduced on account of age for the more than 1500 cash balance plans and 8.5 million participants is still unsettled.

C. "The Rate of an Employee's Benefit Accrual" is Based On the Annual Change in the Value of an Annuity at Normal Retirement Age Expressed in Annuity Form.

In *Cooper*, the court stated, without support, that: "there is no statutory difference between the treatment of economically equivalent defined-benefit and defined-contribution plans." 457 F.3d at 639. By this statement, the

Cooper court implicitly rejected the rationale of the decisions in *Miller, Lyons, Berger* and *Esden*.

There are significant differences between defined benefit and defined contribution plans in funding, the nature of the benefits provided, how their benefits are computed, whether they are insured by the PBGC, and how Congress decided to regulate them. *Esden*, 229 F.3d at 158 ("the regulatory consequences of this [defined benefit plan] classification are wide-reaching."); *Lyons*, 221 F.3d at 1251. *Cooper* blatantly ignores the admonition by the Court in *Hughes Aircraft*, that "it is essential to recognize the difference between defined contribution plans and defined benefit plans." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999).

By ignoring their essential differences as "whimsical," it was very easy for the Seventh Circuit to make the jump to the conclusion that the rates of benefit accrual for both types of plans should be measured by the same method. However, this ignores the fundamental distinction between the plans concerning the definition of "accrued benefit." As the Court explained, "accrued benefit" in a defined contribution plan is the "balance of the individual's account." ERISA §3(23)(B), 29 U.S.C. §1002(23)(B); *Hughes Aircraft*, 525 U.S. at 439. Thus, age discrimination should be found in defined contribution plans if "the rate at which amounts are allocated to employee's account . . .is reduced, because of the attainment of any age." ERISA §204(b)(1)(A), 29 U.S.C. §1054(b)(1)(A). In contrast, in a defined benefit plan, the "accrued benefit" is defined as "the individual's accrued benefit determined under the plan...[and ordinarily is] expressed in the form of an annual benefit commencing at normal retirement age." ERISA §3(23)(B); 29 U.S.C. §1002(23)(B); *Hughes Aircraft*, 525 U.S. at 440. Thus, age

discrimination should be found in defined benefit plans if "an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age." ERISA §204(b)(1)(H), 29 U.S.C. §1054(b)(1)(H).

Like other tests under ERISA and the Code for defined benefit plans, *e.g.*, IRC §415(a) (to test for top-heavy discrimination, use of benefits in defined benefit plans compared with allocations in defined contribution plans), the defined benefit test focuses on the amount of benefits the employee will receive beginning at normal retirement age; contributions or allocations are irrelevant because there is no individual account to which they may be added. *Berger*, 338 F.3d at 758; *Miller*, 447 F.3d at 735 ("interest credits are defined benefit entitlements specified by the plan terms and are not analogous to the investment growth of a defined contribution plan").

Following *Miller*, *Berger* and *Esden*, the rate of an employee's benefit accrual under a cash balance plan is determined by converting the contents of the Plan's hypothetical "account" into an annuity at normal retirement.[4] "[T]he benefits attributable to interest credits are accrued benefits" and as such "must be valued in terms of the annuity that [they] will yield at normal retirement age." *Esden*, 229 F.3d at 163 and 166; *Berger*, 338 F.3d at 761 ("pension entitlement" is the "pension at age 65 based on his cash balance as increased by future interest credits"); *Miller*, 447 F.3d at 733. It is the benefit commencing at retirement that

---

[4] In contrast, the PPA amendments permit an accrued benefit to be expressed in one of three ways including as the balance of a hypothetical account. Section 701(b)(1) of the PPA, PUB. L. NO. 109-280, 120 STAT. 780 (2006).

serves as the yardstick for determining compliance with ERISA § 204(b)(1)(H).

The Treasury Department recognizes, and no one seriously disputes, that cash balance formulas generally offer a "larger accrual for younger employees when measured as the increase in the benefit payable at normal retirement age." 67 Fed. Reg. 76123, 76126. Designed with flat pay credits, or with graded pay credits that flatten out sometime after age 40, many cash balance plans accrue retirement benefits at rates that decrease with advancing age. In terms of an annuity at age 65, the interest credits will always be more valuable for a younger employee as opposed to an older employee. *Richards v. Fleetboston Financial Corp.*, 427 F. Supp. 2d 150, 163 (D. Conn. 2006).

The statutory text shows that Congress purposefully adopted two separate tests for age discrimination under pension plans. The test for a defined benefit plan is based on "the rate of an employee's benefit accrual," whereas the test for a defined contribution plan is based on "the rate of allocations to the employee's account." ERISA §§204(b)(1)(H) and 204(b)(2).[5] When Congress "uses certain language in one part of the statue and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n. 9 (2004). The *Cooper* decision flouts this assumption by construing the phrase "rates of benefit accrual" to mean the same as the term "allocations." In ERISA, Congress showed that it understood the difference between "rate of benefit accrual" and "allocations." *E.g.*, IRC §415(a); *see Richards*, at 164.

---

[5] See also ADEA §4(i)(1); IRC §§411(b)(1)(H) & (b)(2).

Moreover, if Congress wanted to offer plan sponsors a cost-based testing alternative for defined benefit plans based on imputed individual costs, it could have done so by modifying the defined contribution test or the EEOC's equal-benefit or equal-cost regulations to allow companies to impute individual costs for the retirement benefits for younger and older workers. 29 C.F.R. §1625.10. However, the legislative history shows that Congress was aware that repeal of the exclusion of older workers from benefit accruals would be costly. It is unthinkable that Congress purposefully enacted two statutory tests, but intended, without enactment, a third test to be implemented depending on a defined benefit plan sponsor's contractual definition of the plan's benefits.[6]

D. Employee Benefit Plan Provisions May Result in Age Discrimination.

Not surprisingly, employee benefit plan provisions have often been found to result in sex or age discrimination. In *City of Los Angeles Dep't of Water & Power v. Manhart*,

---

[6] Indeed, Congress has shown it is quite capable of changing pension rules to respond to problems with the statute when it believes it is appropriate. *E.g.*, Older Workers Benefit Protection Act, PUB. L. NO. 101-433, 104 STAT. 978 (1990) (codifying the EEOC's "equal benefit or equal cost" principle for age-based benefit reductions); Omnibus Budget Reconciliation Act of 1990, PUB. L. NO. 101-508, 104 STAT. 1388 (1990) (raised excise tax on pension plan reversions and permitted asset transfers from over funded pension plans to health care accounts for retiree health benefits); Retirement Equity Act, PUB. L. NO. 98-397, 98 STAT.1426 (1984) (requiring plans to pay survivor's benefits to spouses, unless waiver is obtained, to protect spouses).

435 U.S. 702, 716 (1978), the Court held that a plan provision, which was ubiquitous at that time, requiring women to contribute more to a pension plan than men because of women's longevity was a pattern or practice of discrimination. *See also Maki v. Allete, Inc.*, 383 F.3d 740, 745 (8th Cir. 2004) (reversing dismissal of complaint where women alleged that bridging provisions in a pension plan "were adopted in a discriminatory manner"). Reducing benefits based on age, or proxies for age, has also been held to be discriminatory. *See, e.g., Arnett v. CalPERS*, 179 F.3d 690, 695 (9th Cir. 1999), *vacated and remanded on other grounds*, 528 U.S. 1111 (2000) (disability benefits reduced based on potential years to retirement are age discriminatory); *Solon v. Gary Community Sch. Corp.*, 180 F.3d 844, 852-53 (7th Cir. 1999) (early retirement incentives that are reduced for each month employee is over age 58 are discriminatory).

Courts have specifically held that discrimination is not eliminated by framing it in "neutral" economic terms that necessarily correspond with sex or age. In *Arizona Comm. for Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), an employer contended that lower monthly retirement benefits for women employees resulted from a factor other than sex, namely, "longevity." Following *Manhart*, the Court ruled that "one cannot say that an actuarial distinction based entirely on sex is based on any other factor than sex." *Id.* at 1081. Similarly, the Court rejected the alternative contention that the lower monthly payments for women were not discriminatory because they have "approximately the same present actuarial value" as the higher monthly payments for men. *Id.* at 1082-3.

The same principles apply in age discrimination. A "Reasonable Factor Other than Age" cannot be a factor that uses age, directly or indirectly, as a "limiting criterion." 29

C.F.R. §1625.7(c). In *Arnett v. CalPERS*, 179 F.3d at 695, the State of California based disability benefits on 2% of pay multiplied by "potential years of service" to retirement. The Ninth Circuit held that the "practical application" of the formula "leaves no doubt that age at hire ... is the sole basis for lower benefits."[7] *See also EEOC Compliance Manual*, Section 3, Employee Benefits (issued October 27, 2000) (formula that bases benefits on "potential years" to retirement is a proxy for age because it gives younger workers more "constructive years" than older workers).

Like the benefits in *Norris* which could not be calculated without knowing the participant's sex or in *Arnett* which could not be calculated without knowing the participant's age, benefits under a cash balance plan may only be calculated by knowing the participants' age. Thus, the result in *Cooper* contradicts the reasoning underlying *Norris* and its progeny like *Arnett*.[8] Quite simply, in all of these cases the benefit calculation is inseparable from the protected characteristic of age.

---

[7] The Court vacated *Arnett* because *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), ruled that public employees cannot sue State governments under federal age discrimination law. However, the EEOC subsequently refiled the suit and obtained the largest recovery in EEOC history. *See* AARP Magazine, July-Aug 2003, available at, http://www.aarpmagazine.org/lifestyle/Articles/a2003-05-21-mag-justice_age.html.

[8] Unlike the benefits under a cash balance plan, benefits under a flat dollar plan are calculated using participants' years of service; their ages are irrelevant.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be granted.

Dated: December 2006

Respectfully submitted,

Mary Ellen Signorille
(Counsel of Record)
AARP Foundation Litigation

Melvin Radowitz
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae*
AARP